YEW WAN LEONG

v.

LAI KOK CHYE

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HARUN HASHIM SCJ
GUNN CHIT TUAN SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-173-89]
12 MARCH 1990

CONTRACT: *Agreement to purchase shares - Deposit paid - Time to be the essence of the contract - Purchaser requesting for extension of time to complete sale - Extension of time allowed - Whether time no longer of the essence - Subsequent offer by purchaser to pay a lesser sum in lieu of taking up the shares - Whether vendor entitled to claim agreed liquidated damages - Section 63 Contracts Act 1950.*

CIVIL PROCEDURE: *Pleadings - Parties bound by the pleading - Duty of Court to decide only on issues which have been pleaded - Function of pleadings - Trial Court making a decision on issue which was not pleaded - Order of Court dismissing plaintiffs' claim set aside.*

By a contract in writing dated 14 July 1981, the defendant agreed to purchase 100,000 ordinary shares in Ganda Holdings Bhd., from the plaintiff for a sum of RM350,000. The defendant paid RM35,000 as deposit to the plaintiff which would be forfeited if the defendant failed to complete the sale by or on 30 September 1981 and further, the defendant was to indemnify the plaintiff for the difference in the agreed price and forced sale value.

On 24 September 1981, the plaintiff had purchased and possessed 100,000 Central Securities Berhad shares (formerly Ganda Holdings Berhad). On 26 September 1981, the defendant was granted an extension of four days for completion of the purchase and payment of the agreed balance price of RM315,000. On 1 or 2 October 1981, the defendant met the plaintiff and said that he was not in a position to raise the required money and agreed to pay RM70,000 in lieu of taking up the shares. The plaintiff delivered the said shares on 5 October 1981 to the defendant which were rejected by the defendant. The shares were subsequently sold and the plaintiff claimed RM139,088 as the difference between the agreed and forced sale prices. The learned trial Judge accepted the contention of the defence that the plaintiff was not in possession of the 100,000 shares by the 25 or 26 September 1981. The trial Judge accepted the evidence of the plaintiff that the defendant had offered to pay him RM70,000 in settlement of the matter. The Judge concluded that the parties "had agreed to rescind the former contract and to substitute another contract the terms of which were that the plaintiff was to retain the shares and the defendant to pay him RM70,000. As the defendant had already paid RM35,000 as deposit, the plaintiff was entitled to the balance of RM35,000, but as there was no claim in the alternative under the subsequent agreement, the Court was unable to award the RM35,000. The plaintiff's claim was dismissed.

Held:

[1] The learned Judge had decided on an issue which was not reflected in the pleadings or the submissions of the parties. The substitution of a new contract under s. 63 of the Contracts Act was never an issue between the parties.

[2] The trial of a suit should be confined to the pleas on which the parties are at variance.

[3] As the High Court had made a decision on an issue which was not raised by the parties in their pleadings the appeal in this case must be allowed and the order of the learned Judge dismissing the plaintiff's claim set aside.

[4] The learned Judge miscontrued the evidence and drew the wrong inference that it was the plaintiff who sought the extension and further gave no weight to the exhibit which showed that the plaintiff had already purchased and was ready to deliver the shares by 25 September 1981.

[Appeal allowed. Order of High Court dismissing plaintiff's case set aside. Defendant ordered to pay plaintiff the sum of RM35,000 with interest at 8% per annum from the date of judgment of High Court to date of realisation with costs in Supreme Court/High Court. Deposit refunded to plaintiff.]

Cases referred to:
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196
Wisma Punca Emas Sdn. Bhd. v. Dr. Donal R. O'Holohan [1987] 1 MLJ 393
Muniandy & Anor. v. Muhammad Abdul Kader & Ors. [1989] 1 CLJ (Rep) 116

Legislation referred to:
Contracts Act 1950, s. 63

For the appellant - Paul Subramaniam; M/s. Maxwell Kenion Cowdy & Jones
For the respondent - F.H. D'Cruz; M/s. Tay Leong Siak & Co.

JUDGMENT

Gunn Chit Tuan SCJ:

By a contract made in writing on 14 July 1981, one Yew Wan Leong (the plaintiff) agreed to sell and one Lai Kok Chye (the defendant) agreed to buy 100,000 ordinary shares in Ganda Holdings Berhad at the price of RM3.50 per share amounting to RM350,000. On the execution of the said contract the defendant paid the plaintiff RM35,000 by way of deposit and it was agreed that the balance would be paid and the sale completed on or before 30 September 1981. It was a term of the contract that in the event that the defendant fails to complete the purchase the plaintiff shall be entitled to retain the said sum of RM35,000 received as a deposit from the defendant and the defendant would have to indemnify the plaintiff in a sum equal to the difference between the sum received by him from the sale of the said shares to any listed share brokers and the purchase price mentioned in the said contract. It was also provided in the said contract that time whenever mentioned should be the essence of the contract.

The plaintiff in his statement of claim averred that he was ready and willing to perform and complete the said sale on or before 30 September 1981, but at the oral request of the defendant on 26 September 1981, he granted an extension of time of four days for completion of the purchase and payment of the agreed balance price of RM315,000. It was also contended by the plaintiff that by requesting and granting the extension of time to complete the purchase, time was no longer made the essence of the contract and the parties by their conduct had waived the time being the essence of the contract.

The defendant in his statement of defence averred that he had no communication whatsoever with the plaintiff as alleged and that there was no waiver of any of the terms of the contract. The plaintiff, however, gave evidence in the High Court that he and the defendant met at the Fairmont Hotel, Ipoh, on or about 1 or 2 October 1981.

He had the shares ready for delivery but stated that the defendant claimed that he had lost quite a large sum of money playing shares and that he could not raise the required sum of money. He also said that the defendant then asked him to reduce the amount and was prepared to pay him RM70,000 in lieu of taking up the shares. That sum of money was not paid by the defendant and on 5 October 1981, the plaintiff delivered 100,000 Central Securities shares through their respective bankers (Exhibit P6) but the shares were returned to the plaintiff on 11 November 1981, through the same bankers as the defendant refused to accept them. The plaintiff sold the shares between 9 October 1981 and 30 November 1981 for RM210,912.30 and therefore claimed RM139,088 being agreed liquidated damages, that is, the difference between the agreed and forced sale prices.

In support of his case, the plaintiff called his bank manager to prove that the shares had been dispatched to the defendant's bankers and were returned unpaid on 11 November 1981. The plaintiff also called an accountant attached to a firm of stock brokers called Kin Khoon & Co., to show that he had purchased and possessed 100,000 Ganda Holdings Berhad's shares as at 24 September 1981 and was in a position to deliver them for sale on that date. That witness also produced a letter from his firm to confirm that the plaintiff had in fact purchased 100,000 Ganda shares as at 24 September 1981. Another witness called by the plaintiff was one Su Sein Thong (PW5) who had introduced the defendant to the plaintiff and who was a witness to the agreement signed by them on 14 July 1981. PW5 also confirmed that the parties met at the Fairmont Hotel where it was agreed that RM70,000 would be paid by the defendant to the plaintiff to settle the matter.

The defendant who had averred in his statement of defence that he rejected the alleged delivery of the shares in question because they were not delivered in accordance with the express terms of the said contract, chose not to give any evidence but to discredit the plaintiff's case by contending that certain inferences should be drawn from both the plaintiff's oral and documentary evidence. His defence was generally that the plaintiff had departed from the terms of the said contract and was therefore in breach of it. The first alleged breach was for holding out that he was the registered owner of the shares at the time the agreement was signed when he was not so. The second and main objection was for failure to deliver the shares before the completion date. The learned Judge found that the first issue raised by the defence was a trivial one and was in his opinion immaterial. He held that the fact the plaintiff had yet to obtain those shares was not so material as his ability to deliver them to the defendant on or before the completion date. The learned Judge considered that the second issue i.e., the late delivery of the shares merited serious consideration, and noted that although the defendant did not seriously challenge the evidence about the subsequent meeting between the parties at the Fairmont Hotel, however, accepted the contention of the defence and drew the inference that the plaintiff was not in possession of the 100,000 shares by 25 or 26 September 1981, because of his hurried communication by telephone with the defendant and the subsequent meeting between the parties which lasted for a few hours. With respect we considered that the learned Judge had drawn the wrong inference that it was the plaintiff who had sought the extension of time for completion of the contract because of the several urgent attempts to contact the defendant before the date of completion. He had also misconstrued the contract notes marked Exhibit P3AX which were not contract notes by which the plaintiff had bought the shares in question but were in fact contract notes by which he had sold the shares from 9 October 1981 onwards after the defendant had failed to take delivery of them in accordance with the terms of the contract in question. The learned Judge had also forgotten or given no weight to Exhibit P4 which showed that the plaintiff had already purchased and was ready to deliver those 100,000 shares by 24 September 1981.

He however, noted and accepted the evidence of the plaintiff that the defendant had offered to pay him RM70,000 in settlement of the matter or in other words, to pull out of the said agreement and held that fact could not be challenged by the defendant because he had elected not to give any evidence at all. He also held and accepted the evidence of the plaintiff that the defendant did not have any money to pay for the balance of RM315,000 if and when the shares were delivered. After finding that the defendant had agreed to pay RM70,000 and having noted that a sum of RM35,000 was paid as deposit earlier on and that the plaintiff could only claim for another RM35,000, the learned Judge however considered that he was in no position to award that sum "due to the legal implication arising from this transaction". He said the claim by the plaintiff was based "on the original contract and not the subsequent oral agreement" and concluded that the parties "had agreed to rescind the former contract and to substitute another contract the terms of which were he was to retain the shares and the defendants to pay him RM70,000". He then went on to consider s. 63 of the Contracts Act 1950, concerning the effect of novation, rescission and alteration of contracts and stated that if the parties to a contract agreed to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. He therefore considered that the plaintiff was disentitled to sue on the original contract and as he had no claim in the alternative under the subsequent agreement, he was unable to award the RM35,000 which in his opinion the plaintiff would have been entitled to and therefore dismissed his claim, but in doing so granted him leave to institute fresh proceedings.

Mr. Subramaniam, Counsel for the appellant, pointed out that the learned Judge had decided on an issue which was not reflected in the pleadings or the submissions of the parties. He stressed that the substitution of a new contract under s. 63 of the Contracts Act was never an issue between the parties and referred to the written submission of defence in the Court below in which Mr. D'Cruz, Counsel for the defendant, had asked the Court to reply on the written agreement in this case. Counsel also pointed out that the defendant had pleaded that there was no waiver of the original agreement and had not pleaded any oral agreement, which he urged the Court to ignore, as neither side had pleaded a new contract. The learned Judge had therefore erred in holding that there was a new substituted contract, and reference was made to *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 in which Sharma J (as he then was) had made observations on the function of pleadings and the duty of course to follow rules of procedure and practice. We agreed with the following passage in the judgment of the learned Judge in that case in which his Lordship stated:

> The Court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the Court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

Counsel also referred to *Wisma Punca Emas Sdn. Bhd. v. Dr. Donal R. O'Holohan* [1987] 1 MLJ 393 at 395 in which case this Court had also referred to *Janagi v. Ong Boon Kiat* and considered that Sharma J had rightly held that the trial of a suit should be confined to the pleas on which the parties are at variance.

Although Mr. D'Cruz conceded that in the statement of defence there was no pleading regarding a new substituted contract, he stated that when the defendant elected to lead no evidence he took the risk that the plaintiff could or could not prove his case. He referred to a letter from Malayan Banking Berhad dated 5 October 1981, to the defendant's bank

concerning the delivery of 100,000 Central Securities Berhad's share certificates (Exhibit P6) and also to his submission in the Court below that the shares dispatched to his client according to Exhibit P6 were 100,000 Central Securities Holdings Berhad's shares and contended that it showed that they were not Ganda Holdings Berhad's shares. He contended that although the defendant did not plead the substitution of a new contract, the plaintiff's evidence referred to a new contract and the learned Judge found it to be so. He contended that the learned Judge had come to the right conclusion albeit for wrong reasons.

In his reply Mr. Subramaniam pointed out that in his statement of defence the defendant never pleaded that wrong shares were delivered. He also referred to his submission in the Court below when he had pointed out that Central Securities (Holdings) Berhad was the former name of Ganda Holdings Berhad.

We would point out that this Court has recently once again stressed the importance of pleadings in *Muniandy & Anor. v. Muhammad Abdul Kader & Ors.* [1989] 1 CLJ (Rep) 116 in which Mohd. Azmi, SCJ stated that:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 at p. 233:
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> > Under our adversary system of procedure, for a Judge to disregard the rule by which Counsels are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating what his answer to it is ...

As the High Court had made a decision on an issue which was not raised by the parties in their pleadings the appeal in this case must be allowed and the order of the learned Judge in dismissing the plaintiff's claim set aside. As there is evidence which was accepted by the learned Judge that the defendant had agreed to pay the plaintiff to settle the matter concerning the written contract entered into by them on 4 July 1981, and taking into account that RM35,000 deposit had been paid to the plaintiff earlier on, we therefore ordered the defendant to pay the plaintiff RM35,000 together with interest at the rate of 8 per cent per annum from the date of the judgment of the High Court to the date of realisation and costs here and in the Court below. The deposit of RM500 was also ordered to be refunded to the plaintiff.

Also found at [1990] 1 CLJ 1113